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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DONALD BREN, Plaintiff and Respondent, v. JENNIFER GOLD, Defendant and Appellant.	B190299 (Los Angeles County Super. Ct. No. BF023597)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu , Judge. Reversed in part and affirmed in part.

Hillel Chodos; Hugh John Gibson for Defendant and Appellant.

O'Melveny & Myers, Daniel M. Petrocelli, Robert C. Welsh, Amber B. Holley; Wasser, Cooperman & Carter, Dennis M. Wasser, Michael Brourman for Plaintiff and Respondent,

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This appeal involves a paternity and child support judgment rendered under the Uniform Parentage Act (UPA). (Fam. Code, § 7600 et seq.)[1] This case is one of three lawsuits between the parties that raise a single issue: child support. Unfortunately, the trial court allowed the biological father's paternity action to go forward against the natural mother alone, without requiring the joinder of the children, as is mandated by statute. (§ 7635.) While this resulted in a valid judgment between the mother and father, the judgment is not binding on the children, who are entitled to maintain a separate action for support against their biological father.

Apart from challenging the trial court's jurisdiction to render a judgment in the absence of the children, the mother also questions the constitutionality of a UPA provision allowing for confidentiality to be maintained during a paternity action. We find that the statute passes constitutional muster. By the same token, a gag order issued two days after the trial amounts to a prior restraint on speech and must be reversed.

FACTS

Respondent Donald Bren is the biological father of Christie Bren (born in 1988) and David Bren (born in 1992) (the children). Appellant Jennifer Gold is the children's mother, and they reside with her. The children's parentage has never been disputed, and Bren provided the children with financial support by reaching private agreements with Gold. Bren is a well-known Southern California billionaire.

In 2003, Bren filed a "petition to establish parental relationship," naming Gold as the sole respondent. An amendment to the petition expressly sought a determination of Bren's child support obligation. In her response, Gold admitted the allegations in the petition and asked the court to "reserve the right to make any and all orders permitted by law."

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[1] All further statutory references are to the Family Code, unless otherwise indicated.

At a trial setting conference in July 2005, Gold challenged the court's jurisdiction to fix Bren's child support obligation. She argued that she and the children--but not Bren--were entitled to petition for a support determination. Gold asserted that Bren was seeking "an advisory declaration" from the court regarding his support obligation. She asked the court to limit its determination to establishing paternity, without fixing the amount of child support.[2] The court indicated that it would entertain a motion in limine addressing the jurisdictional issue. Instead of filing the motion in limine, Gold brought a petition for writ of mandate, asking this Court to bar any proceedings to determine the amount of child support. Her petition was denied on October 11, 2005 (case No. B184604).

In January 2006, Gold filed a "declination to participate further in proceeding." Gold declined to participate in the paternity action because paternity was not in dispute, so there was no impediment to declaring Bren to be the children's father. Gold also declined to participate because, in her view, the court had no jurisdiction to determine Bren's child support obligation. Finally, Gold stated that the children had instituted a new proceeding to determine Bren's child support obligation, and Gold feared that her participation in the present action would influence or impede the children's support action.[3]

The paternity action was tried by the court in March 2006. The court excluded Gold's attorneys from the courtroom during the trial, as a result of Gold's decision not to participate in the paternity action. After hearing the evidence from Bren's expert witnesses, the court found that Bren is the children's biological father, and ordered him to

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[2] Gold and the children have a lawsuit pending against Bren for fraud relating to his child support agreements. They wish to have Bren's financial obligations decided in the tort action instead of in this paternity case.

[3] In other words, multiple trial judges are occupied with determining Bren's financial obligation to the children, not to mention the efforts of this Court in resolving associated writs and appeals in the three lawsuits.

pay $23,687 per month in basic child support, plus additional expenses totaling an average of $9,000 per month.

The day after the trial, Bren sought an order prohibiting Gold from disclosing any information contained in the court's records. The court granted Bren's application and barred Gold and her counsel from disclosing to the public or revealing in any other court proceeding information obtained from the court's records in the paternity action.

DISCUSSION

1. Appeal And Review

Gold timely appeals from the judgment entered in the paternity action. Because our determination turns upon a legal interpretation of the UPA, we review the matter de novo. (*Librers v. Black* (2005) 129 Cal.App.4th 114, 124.) The de novo standard also applies in this case because the underlying factual predicates are not in dispute. (*Ibid.; Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 856.) Finally, the validity of orders "which restrict or preclude a citizen from speaking in advance" are reviewed with an independent examination to determine their constitutionality. (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241-1242.)

2. The Paternity Action Properly Encompassed A Child Support Determination

Gold argues that the family law court is not allowed to fix child support in the paternity action. This is incorrect. The UPA states that the paternity judgment may contain--in addition to the determination of the existence of a father-child relationship--"any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child." (§ 7637.) Elsewhere, the UPA states that the mother, child, or public authorities may enforce "a duty of support that has been . . . adjudicated under this part . . . ." (§ 7641, subd. (a).) The UPA thus contemplates that a father's support obligation may be adjudicated in a paternity action and become a collectible judgment.

The UPA codifies what was historically an accepted practice. In the past, an action to establish paternity and an action for child support were "frequently combined." (*Everett v. Everett* (1976) 57 Cal.App.3d 65, 69, fn. 6. See also *Carbone v. Superior Court* (1941) 18 Cal.2d 768, 771-772; *Van Buskirk v. Todd* (1969) 269 Cal.App.2d 680, 686-687.) Contrary to Gold's contentions, the child support order is not an "advisory opinion." Rather, it is an enforceable judgment in an actual controversy between parties who have adverse legal interests. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171.) Parents have a legal duty to support their children in a suitable manner. (§ 3900.) Bringing a hybrid paternity/support action was an appropriate means for Bren to establish paternity and accomplish his duty to support the children with a sum of money deemed appropriate by the court.

3. <u>The Judgment In The Paternity Action Is Valid, But Is Binding On Bren And Gold Only</u>

Bren brought his petition under section 7630, which allows a man who is not a presumed father--but who alleges that he is the child's father--to bring an action to determine the existence of a father and child relationship. (§ 7630, subd. (c).) The statute establishing a right to bring an action to establish paternity expressly requires the joinder of certain parties. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 174 pp. 233-235.) To ensure that the child's rights are protected in a paternity action, the child "*shall*, if 12 years of age or older, be made a party to the action. If the child is a minor and a party to the action, the child *shall* be represented by a guardian ad litem appointed by the court." (§ 7635, subd. (a), italics added.)[4] By contrast, the statute specifies that the natural mother "*may*" be made a party to the paternity action, and afforded notice and an opportunity to be heard. (§ 7635, subd. (b), italics added.)

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[4] Christie was 17 and David was 14 when the matter came to trial in 2006.

This Court has interpreted the mandatory language of the statute to mean that children are "indispensable parties" to a paternity action. (*Perez v. Department of Health* (1977) 71 Cal.App.3d 923, 927 (*Perez*) [applying former Civ. Code, § 7008, the predecessor to § 7635].) "[T]he child is the real party in interest in a suit to establish paternity and obtain support." (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 281; *Everett v. Everett, supra,* 57 Cal.App.3d at p. 69.) The natural mother may have coextensive interests with her children, particularly if she is entrusted with their care and maintenance. (*Ruddock v. Ohls, supra,* 91 Cal.App.3d. at p. 277.) However, there must be some showing that the mother has acted as "'a proper representative of [their] interests.'" (*Ibid.; Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 951; *County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1843-1844.)

Gold declined to participate in the paternity action. As a result, she cannot be considered "a proper representative" of the children's interests at trial. (*Armstrong v. Armstrong, supra,* 15 Cal.3d at p. 951.) She was never appointed as the children's guardian ad litem in the action. She did not respond to discovery or provide documentation of the children's expenses. Instead, the court allowed Bren to proceed to trial without service of process on or the participation of the children, and without a court-appointed guardian ad litem, as is required by section 7635. Without the children's participation, there was no evidence of their actual support needs.[5] The evidence that was presented at trial was speculation on the part of Bren's expert witnesses regarding the children's needs.

In *Perez, supra*, 71 Cal.App.3d 923, this Court wrote that the father's failure to include the children in his paternity action was fatal. Perez named only the Department

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[5] Bren's accountant testified that "we were not able to obtain the records of the actual living expenses of the family for any period at all. We were told that Mrs. Gold declined to give us the actual disbursements for the family or children." Although the accountant had past expenses submitted by Gold for certain things, he otherwise "simply use[d] estimates."

of Health as the defendant. (*Id.* at p. 925.) *Perez* is distinguishable from the case at bench because the father in *Perez* did not sue the natural mother, as is expressly authorized by the UPA. (§ 7635, subd. (b).)

Here, Gold was named as a party and served with the paternity action. The judgment is effective between Bren and Gold, because the court has power to render a decision with respect to "the parties properly before it." (*Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1519; *Halper v. Froula* (1983) 148 Cal.App.3d 1000, 1006; *Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 367-368.) Gold can enforce the judgment and collect whatever Bren currently owes on it.

We emphasize, however, that the judgment in Bren's paternity action has no binding or res judicata effect on the children, who were not named as parties; who were not served; who were not represented in any manner by a court-appointed guardian ad litem at trial; and who had no opportunity to be heard. In view of the requirement in section 7635 that the child be joined as parties, the trial court was mistaken to have proceeded without them. The court had jurisdiction "'to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action.'" (*National Technical Systems v. Commercial Contractors, Inc.* (2001) 89 Cal.App.4th 1000, 1004-1005, fn. 3.) Because the children were absent indispensable parties, the judgment in this case does not bind them.

Bren attempts to argue that Gold waived any argument regarding his nonjoinder of the children by failing to raise it in the trial court. Parents cannot, by their conduct or by agreement, impair a child's independent right to parental financial support. (*County of Shasta v. Caruthers, supra,* 31 Cal.App.4th at p. 1849; *Ruddock v. Ohls, supra,* 91 Cal.App.3d at p. 277.) In this instance, "respondent has not established that the interests of the child[ren] received actual and efficient protection with the mother acting in a representative capacity." (*Id.* at p. 279.) The children's interests were not represented at the trial, by Gold or by a court-appointed guardian ad litem. (Compare *Van Buskirk v. Todd, supra*, 269 Cal.App.2d at p. 687, wherein the mother served as guardian ad litem,

and "it is clear that she acted in behalf of the minor consistently with the duties of a guardian ad litem.") The children were effectively abandoned in this litigation. They had "no control over the litigation, choice of tactics or right to appeal." (*Ruddock v. Ohls, supra,* 91 Cal.App.3d at p. 284.) We cannot allow the children's rights to be curtailed by the machinations of their parents.

Bren was charged with naming all indispensable parties in his petition, so that a full and fair adversary hearing could resolve the children's paternity and right to support. (§ 7635; *Perez, supra,* 71 Cal.App.3d at p. 927.)[6] Contrary to Bren's contention, failure to join "prospective adoptive parents" in a paternity action is not comparable to a failure to join the children themselves. (See *Jermstad v. McNelis* (1989) 210 Cal.App.3d 528, 537-538.) Joinder of the children is required by section 7635. Indispensable parties cannot have their rights "waived" by others who are joined in the action, but who did not purport to represent the interests of the indispensable parties at trial. Bren insisted that the paternity determination and the support determination be made in the same proceeding, in a petition brought under the UPA. Having made the election to proceed under section 7630, Bren was subject to the requirements of section 7635, which mandates that children over the age of 12 be made parties to the action.

The children have sued Bren for child support in a separate lawsuit under section 4000 et seq., through a guardian ad litem, and they are within their rights to take action to protect their interests.[7] If Bren is obliged to undergo discovery from the children regarding his financial assets, as well as a new trial regarding his support obligation to the children, it is because his attorneys ignored the mandatory language of section 7635 and

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[6] Bren contends that Gold "refus[ed] to permit the Children to participate in the Paternity Action." Bren instituted the paternity action; he was the one who selected which persons to name as respondents. He cannot blame Gold for his own failure to join the children in his action.

[7] Section 4000 provides that an action may be brought by a child against a parent who has a duty to provide support but fails to do so.

failed to join the children as parties to his action, thereby leaving him exposed to the possibility of a later, inconsistent support judgment in favor of the children. (See *Kraus v. Willow Park Public Golf Course, supra,* 73 Cal.App.3d at p. 367 [failure to join all necessary parties "leave[s] a party exposed to a later inconsistent recovery by the absent person"].)

4. Propriety Of A Confidential Proceeding

The UPA authorizes the trial court to conduct a closed, confidential hearing. The law provides that "a hearing or trial held under this part may be held in closed court without admittance of any person other than those necessary to the action or proceeding." (§ 7643, subd. (a).) In addition, all papers and records involved in the proceeding, other than the final judgment, "are subject to inspection only in exceptional cases upon an order of the court for good cause shown." (*Ibid*.) The statute allows "the parties to the action and their attorneys" to inspect papers and records pertaining to the action or proceeding. (§ 7643, subd. (b).)

Despite the plain language of section 7643, Gold argues that Bren's paternity/child support petition had to be litigated in an open proceeding. However, she does not offer any compelling reason for declaring the statute unconstitutional. Gold decided not to participate in the paternity action; therefore, her attorney's exclusion from the courtroom made no difference because he could not object to the evidence or otherwise interject himself into the proceeding. The confidentiality order does not impact Gold's right to petition for redress of grievances: nothing in the order prevents Gold from suing Bren in other venues. And, in fact, she has already done so.

Gold suggests that the constitutional validity of section 7643 "is doubtful." We are required to interpret a statute "in a fashion that avoids rendering its application unconstitutional." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 (*NBC*).) Gold cites a recent case in which Division Eight of this District declared unconstitutional a family law statute allowing a party to a divorce proceeding to ask the trial court to seal documents relating to financial assets, *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1052-1053 (*Burkle*).) The court in *Burkle* reasoned that a

divorce is an "'ordinary civil trial [or] proceeding[ ]'" that is not subject to closure. (*Id.* at pp. 1055-1058.) *Burkle* extended the holding of the *NBC* case, *supra*, in which the Supreme Court concluded that an ordinary civil tort suit between two celebrities could not be closed to the public or the press. (*NBC, supra*, 20 Cal.4th at p. 1181-1182.)

The *NBC* decision acknowledges that the Legislature can limit public access "to particular proceedings governed by specific statutes." (20 Cal.4th at p. 1212, fn. 30.) *Burkle* cites paternity proceedings and section 7643 as an example of a "particular proceeding" in which the right of access is limited by a specific statute. (135 Cal.App.3d at pp. 1058-1059, fn. 17.) Proceedings involving juveniles are traditionally closed to the public; therefore the constitutional right of access does not extend to these proceedings. (*San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 Cal.App.3d 188, 197, 205. See also *NBC, supra*, 20 Cal.4th at p. 1212, fn. 30 [juvenile dependency proceedings are not open to the public].) The Supreme Court sees "no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles." (*In re Gault* (1967) 387 U.S. 1, 25.)

Actions under the UPA address "the prospective rights of a minor child to establish paternity," which is "a child's most fundamental right next to life itself." (*Ruddock v. Ohls, supra*, 91 Cal.App.3d at p. 278.) Because paternity actions litigate a child's fundamental right, we conclude that the Legislature had a legitimate purpose in protecting children from the stigma of "illegitimacy" by limiting public access to the proceedings.[8] (*Louden v. Olpin* (1981) 118 Cal.App.3d 565, 569.) We have previously

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[8] We cannot say whether the children in this particular case have been stigmatized. We can only say that Gold has pursued an aggressive campaign against Bren, presumably to embarrass him and extract a favorable settlement. There is no indication that Gold or her counsel has in mind the children's right to privacy. The children appear to be serving

had occasion to note that "a court may properly act to protect a minor from "'"the social stigma of being branded a child of an adulterous relationship."'" (*Susan H. v. Jack S.* (1994) 30 Cal.App.4th 1435, 1440, fn. 3.)

A paternity action is not comparable to a divorce proceeding between two adults, because divorce proceedings are "'"historically and presumptively" a matter of public record.'" (*In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406, 1412.) Nor is the determination of a child's rights comparable to an ordinary tort suit between two adults, as in the *NBC* case. Instead, a paternity action is comparable to juvenile dependency or delinquency proceedings, in which the courts have traditionally restricted public access. A paternity action is not a presumptively open "ordinary civil case." (See *NBC, supra,* 20 Cal.4th at p. 1217.) Given the overriding interest in protecting the privacy of children, who must be made parties to the paternity action if over the age of 12 (§ 7630), we decline to find section 7643 unconstitutional.

5. <u>Gag Order</u>

Gold objects to the court's posttrial order prohibiting the public disclosure of information from the paternity action. The order prevents Gold and her counsel (but not Bren or his attorneys) from disclosing to the public information obtained from the court's records, though Gold may use the information in connection with the paternity suit. Bren applied for the order after Gold's attorneys announced their intention to disclose to the media documents and the trial transcript from the paternity action, and to use this information in their other, pending lawsuits against Bren.

Orders that restrict or forbid a citizen--in advance--from engaging in certain speech are known as "prior restraints"; they are highly disfavored and presumptive First Amendment violations. (*Alexander v. United States* (1993) 509 U.S. 544, 550; *New York Times Co. v. United States* (1971) 403 U.S. 713, 718-726.) "Gag orders on trial participants are unconstitutional unless (1) the speech sought to be restrained poses a

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as ammunition in a parental war over money, a sad commentary on all involved in the three lawsuits.

clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available." (*Hurvitz v. Hoefflin, supra,* 84 Cal.App.4th at p. 1241.)

The "'protected competing interest'" for trial participants is "'the *constitutional* right to a fair trial.'" (*Maggi v. Superior Court* (2004) 119 Cal.App.4th 1218, 1225.) The trial, in this case, is over; therefore, the parties' constitutional right to a fair trial is no longer implicated. The second competing interest is the children's right to be protected from the stigma associated with the paternity action. (*Louden v. Olpin, supra,* 118 Cal.App.3d at p. 569.) That interest is not implicated in this particular instance because Bren conceded paternity at the outset , and no private information regarding the parentage of the children was divulged at trial. Bren cannot show that the information contained in the trial transcript or documentary evidence submitted at trial will prejudice his right to receive a fair trial in any other pending court proceeding.

Bren's concern in asking for a gag order is to prevent anyone from knowing how much his income is. There is no constitutional right to financial privacy. (*Burkle, supra,* 135 Cal.App.4th at pp. 1059-1060.) In any event, "[g]ag orders are not an appropriate method to protect confidential information from disclosure, no matter how damaging or private that information may be. [Citation.] Thus, a gag order is certainly not an appropriate sanction after confidential information has already been disclosed," in this case, at trial. (*Maggi v. Superior Court, supra,* 119 Cal.App.4th at p. 1225.)

In sum, the gag order in this case fails to meet the first prong of the constitutionality test--the speech sought to be restrained does not pose a clear and present danger or serious and imminent threat to a protected competing interest. (*Hurvitz v. Hoefflin, supra,* 84 Cal.App.4th at p. 1241.) We need not reach the other two prongs of the test. (*Maggi v. Superior Court, supra,* 119 Cal.App.4th at p. 1225.) While one might conceive of a case in which the need to protect a child could justify a gag order, this is not that kind of case. The trial court's only apparent goal in this case was to protect information about Bren's monetary worth from public disclosure, not to protect the

children. This type of confidentiality concern does not give rise to a constitutionally permissible reason to impose a prior restraint on speech. The gag order must be reversed.

6. The Trial Judge Was Not Disqualified

Gold observes that the trial judge (Rolf Treu) was disqualified from presiding over the tort suit for fraud against Bren brought by Gold and the children, as a result of her peremptory challenge. She reasons that Judge Treu's disqualification in the tort suit should disqualify him from presiding over Bren's paternity action. We disagree. A disqualification based on a peremptory challenge in one case does not operate as a blanket disqualification as to any other case. If Gold believed that there was good cause to disqualify Judge Treu in the paternity case, she could have exercised her rights under Code of Civil Procedure section 170.1. Gold has made no showing that the judgment in the paternity action is infected by bias or prejudice.

DISPOSITION

The trial court's order prohibiting disclosure of information contained in the court's records is reversed. In all other respects, the judgment is affirmed. Each party to bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.